VIRGINIA
LAW REVIEW

VOL. VII. OCTOBER, 1920 No. 1

THE NINETEENTH AMENDMENT AND AFTER.

IT IS proposed, in this paper, to discuss the following questions:

First. Is the so-called Nineteenth (Woman Suffrage) Amendment to the Federal Constitution within the scope of the Power to Amend conferred upon Congress and the Legislatures of three fourths of the States by Article V of that Constitution?

Second. Assuming this momentous measure to be within the scope of the Amending Power: Has that power been exercised by the necessary three fourths of the State Legislatures in the manner contemplated by Article V so as to make it "to all intents and purposes a part of the Constitution"? And

Third. The bearing of the recent decisions in the Prohibition Cases upon these questions.

I

As a preliminary to the discussion of the first question it is important that we have a clear and definite understanding of the Amendment itself, its exact scope, purport and effect.

In the first place, it is to be observed that the Amendment is not merely an enlargement or extension of the *powers* and jurisdiction of the National Government. It does not content itself with conferring upon the National Legislature the power to pass laws securing to women the right to vote upon the same conditions which may be accorded to men—laws which Congress could at any time alter, amend or repeal whenever and in whatsoever localities such alteration or repeal might be found as the result of actual experience to be necessary to the safety or welfare of the people.

The Amendment reads as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. The Congress shall have power to enforce this Article by appropriate legislation."

It is true that the second section of the Amendment expressly authorizes Congress "to enforce this" Amendment "by appropriate legislation." But the amendment itself, being framed in the exact language of the Fifteenth save for the substitution of the word "sex" for the words "race, color or previous condition of servitude," will almost necessarily receive the same construction, and according to that construction will be "self-executing" in that it will have the effect of striking out the word "made" wherever it appears in those provisions of the Constitutions or laws of the several States relating to the suffrage, thereby conferring upon women the right to vote upon the same terms as men.[1]

In this respect the Suffrage Amendment would seem to be of far more serious import than the Prohibition Amendment. For while the latter expressly prohibits the manufacture, sale, etc., of intoxicating liquor, and overrides all State laws, it prescribes no penalties for its violation and must depend for its enforcement upon such legislation as Congress may from time to time, according to the changing moods of the country, see fit to enact.

On the other hand, in ratifying this Suffrage Amendment, the State Legislatures will be in effect enacting a *law* regulating not only National elections, that is, Presidential, Senatorial and Congressional elections, but their own State, County and Municipal elections, *which law not one of those State Legislatures will ever be able to alter, amend or repeal without the consent of at least thirty-five other Legislatures representing States situated at great distances, many of them thousands of miles—in some cases more than three thousand miles away—while Congress itself will be equally without power to change or repeal the law.* It requires but little exercise of the imagination (the

[1] Myers *v.* Anderson, 238 U. S. 368, and cases cited.

faculty, by the way, which mainly distinguishes man from the brute creation) to enable us to foresee the serious, not to say tragic consequences which might ensue from the enactment of such a practically *irrepealable law*.

It may well be that in some States it will produce all the good results which its most ardent advocates predict. In a State like Nebraska, for instance, where the population is practically all of one race, and mainly Anglo-Saxon at that, the participation of women equally with men in political activities might have no ill effect, social or political. It might not have any tendency to destroy the unity of the family, to increase the frequency of divorce, to affect injuriously the training and welfare of children, to prevent in times of national peril the enactment of those severe, sometimes cruelly severe laws necessary for the safety of the people and the State or Nation. Nothing but actual experience (and perhaps the experience of years) can possibly determine what effect this law would have.

On the other hand, in a State like New Mexico, where the population is largely Mexican, or like California, where within the next fifty or one hundred years a large percentage, if not a majority of the voters may be Japanese (owing to their birth rate being about double that of the whites and their ability to *underlive* the white man), all those evils and others of which perhaps we have not yet dreamed may follow Woman Suffrage. And yet the people of California, *even though every man and every woman within its borders desired to do so,* would not have the power to change a single letter of that law, and it might be a century or more before they could succeed in persuading the Legislatures of thirty-five distant States not to speak of two thirds of each House of Congress, to *permit* them to do so.

No sane man will undertake to say that he can possibly know with any certainty what the political or social effect of giving the right of suffrage to Japanese women would be fifty years hence. The people of California would then perhaps understand what it means to live under a law like that of the Medes and Persians, "which altereth not," and what it meant to give up in a moment of excitement those rights of self-government

which it had required centuries of struggle on the part of their forefathers to secure for them.

Again, if this Amendment had been so framed as to apply to *National* elections only—to elections for members of Congress, Senators and Presidential electors—a very different question might have been presented.

A representative in Congress makes laws not merely for the government of the State from which he is selected, but for all the other States, and the people of all those States have an equal interest and concern with the people of his own State in the question of the character of the electorate by whom he is chosen.

On the other hand, the people of one State have no interest in the question of who shall be qualified to vote in the *local State elections* of the other States.

It is no concern of the people of Oregon that women vote or do not vote at an election for Mayor of Boston or of Philadelphia; and to permit the people of Oregon to *force* the people of Boston or Philadelphia to allow women or any one else to vote at their city elections, is to subject the people of those cities to a tyranny which may, according to circumstances, prove to be none the less intolerable because it is exercised by persons not professing or claiming regal authority and under the forms of republican government. The people of Oregon under these circumstances would be doing in effect what the King of Great Britain did when he vetoed laws enacted by the Colonial Legislatures, which the people of those Colonies had found to be necessary for their own happiness and welfare—one of the main grievances complained of in the Declaration of Independence.

For it is of the very essence of civil liberty that the people of a State should have the power to make their own laws, that is to say, the laws which affect them and them only, and do not affect the people in other States, *and to change, amend or repeal those laws* as their changing needs may require. That is what is meant by the Right of Local Self-Government—the right for the recognition and establishment of which the American Revolution was fought, and the perpetuation of which was the primary object of the framers of the Constitution of the United States. If, by means of the machinery for amending the Fed-

eral Constitution provided in Article V, that most essential right can lawfully be taken away from the people of any State in this Union, then the framers of that Constitution have not only failed of their purpose, but have constructed the most effective instrument of oppression which the wit of man has yet devised.

The question, therefore, whether the power to do this thing—to inflict such an irrepealable law upon the people of any State through the action of State Legislatures (in many instances Legislatures elected before the submission of the Amendment by Congress and in defiance of the plain terms of the State's own Constitution, as in Tennessee and Missouri, and perhaps other States)—is conferred by Article V of the Federal Constitution would seem to be one of sufficient gravity to justify the most serious consideration.

Now the first point to be determined is whether or not there is *any* limit to the power to amend the Constitution conferred upon Congress and three fourths of the State Legislatures by the people of the United States in adopting the original Constitution with Article V. For if the proposition that there is *some* limit to this power of amendment be once established, there will be no great difficulty in demonstrating the further proposition that the Nineteenth Amendment, so-called, exceeds that limit.

In this connection it must be borne in mind, of course, that neither Congress nor the State Legislatures have any power to amend the Constitution except such as was conferred upon them by the people in adopting the Constitution one hundred and thirty years ago. The power to "amend" conferred by Article V is a delegated power purely, and it is the extent of *that* power only which we have to consider. The question is not whether the *people* themselves, acting through their delegates or representatives *chosen for that purpose* in convention assembled, or in separate conventions assembled in each State, as when they adopted the original Constitution, would have the right and lawful power to adopt any Amendment they pleased.

That the people would have that power no one will deny. If the Constitution, as drafted and submitted by the Convention of 1788, had provided for the abolition of all the State Govern-

ments and the substitution of a single Central Government in their stead, the *people* would undoubtedly have had the right and the power to adopt it as they adopted the Constitution which was submitted; and there can be little doubt but that *any* Amendment, however radical, which the people might choose now to adopt in the same manner in which they adopted the original Constitution, by assembling in convention in each and every one of the States and acting favorably upon it, would be valid.

But the question here is—have the people *delegated to their agents,* the Congress and State Legislatures, any such *unlimited* authority or power? If they have, then they have conferred upon their agents of the present day the power to *destroy*, not merely to amend or improve, but to *destroy* the whole fabric of Constitutional Government which their forefathers built. Furthermore, they have utterly failed to establish that which it has always been the proudest boast of American Statesmanship that they had established—"a government of *limited* powers".

It is submitted that that cannot be. It is true that the language of Article V is broad and general in its terms. So far as it relates to the present inquiry it reads as follows:

> "Article V. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution * * * which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Congress; provided that no Amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth Clauses in the Ninth Section of the First Article; and that no State, without its consent shall be deprived of its equal suffrage in the Senate."

But, putting aside for the moment consideration of the effect of the two *express* limitations upon the power to amend contained in this Article, we are certainly bound to apply in construing this general word "amend" the rule universally applied to the interpretation of words of such general import, even when used in ordinary Statutes, Acts of Congress or State

laws. That rule is that general terms as employed in a statute must be construed in the light of the manifest *purpose* which the Legislature had in view, the object sought to be accomplished by the enactment of the law, and not given such a broad or literal interpretation as will defeat that purpose or prevent the attainment of that object.

If the general power to amend conferred by Article V is not limited in this way, if it means that the agents upon whom that power is conferred may literally make any change they see fit, they might adopt an "Amendment" repealing each and every Article of the great instrument and thereby *dissolve the American Union*, so that "the General Government itself would disappear from the family of Nations".

Now, no one will contend that in adopting Article V the people intended to confer any such power as that upon Congress and the State Legislatures, the agents designated in that Article.

But why? Why is it that no such contention can be made? The answer would seem to be sufficiently obvious. The purpose which the people had in view in adopting the Federal Constitution, as set forth in the preamble (which preamble refers to that of the original Article of Confederation)—that purpose, as it has been interpreted and declared by the Supreme Court of the United States, was to establish "a *perpetual* Union"—"an *indestructible* Union of *indestructible States*."[2] Clearly then it could not have been their intention by the general terms employed in Article V to authorize an Amendment of the kind above suggested.

It is not possible to conceive of the existence in the minds of the people who adopted the Constitution of an intention to establish a Union which would be perpetual, and an intention at the same time, expressed in the same instrument, to authorize the dissolution, the destruction of that Union under the pretense of "amending" the Constitution.

We must conclude therefore that the power to amend conferred by Article V is *not* absolute, *not* unlimited: the limitation

[2] Texas *v.* White, 7 Wall. 700; Lane County *v.* Oregon, 7 Wall. 71; Collector *v.* Day, 11 Wall. 113.

upon that power being at least this, that no Amendment was intended to be authorized by the general power to amend conferred by that Article, the effect of which would be either to dissolve the Union or to render it no longer a Union of *"indestructible* States" by impairing the indestructibility of the States or any of them.

The precise question next to be considered then is: Would the power to adopt an Amendment such as the proposed Nineteenth, whereby the right of each State to determine for itself, by the vote of its own people, who shall vote at its own State, County or City elections, or in other words who shall govern the State, is interfered with and in a most serious degree taken away, make the States no longer "indestructible" within the meaning of that term as heretofore employed by the Supreme Court?

In order to find the answer to this question, we have but to look to the great decisions of that Court, in which it has been made clear that by an "indestructible State" it means a State which no agency created or recognized by the Constitution has any legal, constitutional power to destroy, because the State is immune against deprivation or impairment by such agency of any of the functions or powers essential to its independent existence as a State.

The most important of these cases are those above referred to: Texas *v.* White,[3] Lane County *v.* Oregon,[4] and Collector *v.* Day.[5] All of them, it may be noted in passing, were decided by a Court, most of the judges on which had been appointed by President Lincoln.

The case of Texas *v.* White[6] turned upon the question of whether Texas, after its attempted separation from the Union, was still a *"State",* and required an examination of the question as to what constitutes a "State" within the meaning of the Federal Constitution. The question was presented very sharply, and the Court said:[7]

[3] 7 Wall. 700.
[4] 7 Wall. 71.
[5] 11 Wall. 113.
[6] *Supra.*
[7] At p. 719.

"If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit; and it is our duty to dismiss it. * * *

"Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

"It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

"It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular govern ment, or united by looser and less definite relations, consti tute the state. * * *

"In the Constitution the term State most frequently expresses the combined idea just noticed, of people, territory, and government. *A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.* It is the union of *such* states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country.[8] * * *

"The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew

[8] Pp. 720-721.

out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Article of Confederation. By these the Union was solemnly declared to 'be perpetual'. And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union'. It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

"But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed *with all the functions essential to separate and independent existence,*' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an *indestructible Union composed of indestructible States*" (Italics ours.)

No one can read the carefully considered language of these opinions without realizing that when the Supreme Court declared that it was the intention of the people in adopting the Federal Constitution to establish an indestructible Union of Inde-

[9] Pp. 724-725.

structible States, that great tribunal was not indulging in any mere flourish of rhetoric, but that it was making a judicial finding regarding a matter of the most vital concern to the people of the American Union, and a finding which was to furnish a guide for the future to that Court itself so long as the doctrine of *stare decisis* remains a part of our system of jurisprudence.

In Lane County *v.* Oregon [10] the question before the court was whether or not the Legal Tender Acts enacted by Congress in 1862 providing for an issue of United States notes and declaring that the same should be accepted in payment of all debts, public and private, within the United States, etc., could be held to require the State of Oregon to accept such legal tender notes in payment of taxes due to it.

The Court held that Congress could not have had any such intention, and in the course of its opinion makes it very clear that, in its view, a State which Congress could force to accept anything which the State was not willing to accept in payment of its taxes would not be "indestructible" within the meaning of the Constitution. The Court, in the course of the opinion, said: [11]

> "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a State, having its own government, and *endowed with all the functions essential to separate and independent existence.* The States disunited might continue to exist. Without the States in union there could be no such political body as the United States. * * *
>
> "Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an *essential function of government.* * * * If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere

[10] *Supra.* [11] Pp. 76-78.

with the exercise, that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did not intend by the *general terms* of the currency acts, to restrain the exercise of this power in the manner shown by the statutes of Oregon." (Italics ours.)

But the case which, perhaps, most clearly determines what is meant by the term "indestructible State" is that of Collector *v.* Day.[12] Here the question was whether the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States", conferred by Section 8 of Article I of the Constitution, authorized the laying of a tax, however small, upon the salary of a State official—in this case a state judge.

Notwithstanding the broad and general terms in which this taxing power had been conferred, it was held that it did not the ground of the decision being that the right and power to establish and maintain a judiciary was necessary to the existence of a State, that is, such a State as it contemplated by the Constitution; that if any authority outside of the State, such as Congress or the Legislatures of other States, had the power to tax the salaries of judges, it might tax the judiciary out of existence, and thus *destroy* the State, and that, inasmuch as the people in adopting the Constitution intended to establish a union of *indestructible* States, they could not have intended even by the broad and general language of this Article to authorize Congress to lay such a tax. In its opinion, the Court says:[13]

"The cases of McCulloch *v.* Maryland,[14], and Weston *v.* Charleston,[15] were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in McCulloch *v.* Maryland. 'If the States,' he observes, 'may tax one instrument employed by the gov-

[12] *Supra.*
[13] At p. 123
[14] 2 Pet. 49.
[15] 4 Wheat. 316.

ernment in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government.' 'This,' he observes, 'was not intended by the American people. They did not design to make their government dependent on the States.' (And it must be equally true that the American people did not design to make any of the States dependent for their existence as republics—as States with a republican form of government—upon the will of any particular number of the States.) [Parentheses our.]

"Again, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' * * * 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. * * *'

"* * * Upon looking into the Constitution it will be found that but a few of the Articles in that instrument could be carried into practical effect without the existence of the States.

"* * * The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be *crippled,* much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * * Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might.

"* * * *It is admitted that there is no express provision*

> *in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States,* nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon *necessary implication,* and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, *can exist only at the mercy of that government.* Of what avail are these means if another power may tax them at discretion?" (Italics ours.)[16]

This case would seem to be conclusive of the question before us. For if the power to maintain a judiciary whose salaries shall be exempt from taxation by the Federal Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It may be admitted that there is no provision in the Constitution forbidding the submission or the ratification by State Legislatures of an Amendment whereby they shall be forced to admit to the elective franchise in their State elections an equal or greater number of other people whom they are not willing to have vote, but, as said in Lane County *v.* Oregon, their exemption from such an Amendment "rests upon *necessary implication,* and is upheld by the great law of self-preservation," as any government the persons who elect which can be selected and determined by another and distinct government can exist only "at the mercy" of that government, that is, is not "indestructible".

The right of a people to select the persons who are to make and to administer their laws is what constitutes them a "political community of free citizens" and entitles them to be called a State. For (to paraphrase again the language of Lane County *v.* Oregon), of what avail is the right to elect their own State officers, if another power outside the State, that is, Congress and the Legislatures of other States, may take that right away at its discretion?

---

[16] Pp. 125-127.

If this "other power" has the right to say that women shall vote at State elections in States like Virginia and Maryland, which have rejected this Suffrage Amendment, it would have equally the right to say that *men* shall *not* vote in those States or that only *certain* men or *certain* women shall vote. What then becomes of those States? Can they be said to be indestructible States if their continued existence is thus "at the mercy" of another? Or could such a State be said to be still "a political community of free citizens with a government established by the consent of the governed"?

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects.

It might be a sufficient answer to that contention to say that the maxim *"expressio unius, exclusio, alterius"*, while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the Courts would certainly look to the consequences which might follow such an interpretation of Article V, as we have endeavored to point out those consequences or some of them in this article, and, viewing those consequences, would be governed by the principle so forcibly stated by Mr. Justice Miller in his great opinion in the Slaughter-House cases, as follows:[17]

> "The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both of these governments to the people; the argument

[17] 16 Wall. 36. 78.

> has a force that is irresistible, in *the absence of language which expresses such a purpose too clearly to admit of doubt.*" (Italics ours.)

Surely it cannot be said that Article V confers upon Congress and the State Legislatures, or three fourths of them, the power thus to destroy the "indestructible Union of indestructible States" in language which expresses such a purpose too clearly to admit of doubt.

But perhaps a more conclusive answer to this contention will be found in the fact that the Supreme Court turned down the same argument when made for a like construction of the Taxing Clause of the Constitution,[18] in Collector *v.* Day.[19]

For it will be remembered that while Section 8 of Article 1 confers upon Congress the "power to lay and collect taxes" in general terms, there are several other *express* exceptions or limitations on this taxing power contained in this Article; such as the provisions that "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration, etc." and that "No tax or duty shall be laid on articles exported from any State." Nevertheless the general power "to lay and collect taxes", as we have already seen, was held not to include the power to lay a tax on the salary of a State judge.

On the other hand, the special prohibition contained in Article V against the adoption of any amendment depriving a State of its "equal suffrage in the Senate" when carefully considered will be found to furnish actual confirmation of the contention that the Amendment in question is in excess of the amending power.

Assuming that the Fifteenth Amendment, construed to be applicable to State elections, is 'an Amendment' within the meaning of that term as employed in Article V of the Constitution, it falls within the express prohibition therein contained against any Amendment which would deprive a State of its equal suffrage in the Senate, without its consent.

For it is easy to see that, by means of an Amendment of this kind, it would be no difficult matter to nullify utterly this prohibi-

[18] U. S. Const., Art. 1, Sec. 8.

[19] *Supra.*

tion against depriving some State of its equal suffrage in the Senate by changing the essential character of this State, making an entirely new State of it and giving *that* State its suffrage in the Senate. Once let it be admitted that the amending power goes to the extent of authorizing interference with the electorate of a State, and just that result may follow.

If by an amendment of this kind women may be given the right to vote, the right to vote might be given to women only, or even to a special class of women only, as to such women as owned no property—the "proletariat". In that case the original State which had been guaranteed perpetual equal representation in the Senate would have been destroyed and an entirely new State substituted. For, as we have already seen, "a State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and *established by the consent of the governed*. It is the union of *such* States * * * which that Constitution designates as the United States." [20]

Now, what is a political community of free citizens? What constitutes a State? Clearly it is those people in the territory in question who exercise the *political* power—the power to *govern*. They constitute the State. In other words, it is the electorate that for all "political" purposes constitute the State—*they and such other persons as they may from time to time admit to participation with them in the exercise of political power*—the electing of the officials constituting the government of the State.

Whenever that electorate is forced against its will to admit other people, perhaps more numerous than themselves, to participation in the exercise of the powers of government through the elective franchise, they have no longer a "government established by the consent of the governed", and the result is an entirely new State and not the State which was guaranteed (by the people in adopting the Constitution) perpetual equal representation in the Senate. The original State which the people intended to make indestructible will thus have been destroyed.

[20] Texas *v.* White, *supra.*

It will be said, of course, that the same argument might be urged with equal propriety against the validity of the Fifteenth Amendment, and against that clause of the Fourteenth which declares that "All persons born * * * in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside", and that, consequently, if the Supreme Court of the United States should for these reasons hold the Nineteenth Amendment void because unauthorized by the amending power conferred by Article V, it would be compelled for the same reasons to hold those Amendments void also. But this by no means follows.

So far as the Fourteenth Amendment is concerned this contention presents no serious difficulty. For while that Amendment had the effect of forcing the people of the several States which rejected it to admit to citizenship a class of persons to whom they were unwilling to accord that great privilege, and has made American citizenship so cheap that it has ceased to be the priceless franchise which it once was, at the same time it did not give to those persons the right of suffrage, and especially did not give them the right to vote in the election of the State officials—the *government* of the State. So that the State remained what it was before the Fourteenth Amendment was adopted, "a political community of free citizens" with a government established by "the consent of the governed".

In other words, so long as the new citizens were not given *the elective franchise,* the *autonomy* of the State was not affected, and it still retained "all the functions essential to its independent existence".[21] The question, therefore, as to whether or not the citizenship clause of the Fourteenth Amendment was within the scope of the amending power (and upon that question no opinion is now offered one way or the other) would not necessarily be involved in passing upon the Nineteenth.

The Fifteenth Amendment may seem upon first impression to present a greater difficulty, but it is a difficulty which would seem to be conclusively disposed of by the following considerations.

It is true that that Amendment is in principle, with the

[21] Lane County *v.* Oregon, *supra.*

exception of the substitution of the word "sex" for the words "race, color, etc.," identical with the Nineteenth Amendment, and for that reason must have been equally unauthorized in the first instance by the amending power conferred upon Congress and the State Legislatures by Article V; but the holding void of the Nineteenth Amendment would not necessarily furnish any precedent for a like holding as to the Fifteenth for this obvious reason.

While the agents to whom the people delegated in Article V the power of amending the Constitution, that is, Congress and the Legislatures of three fourths of the States, may have exceeded their authority in the case of this Amendment, yet the principal may always cure such lack of authority in an agent by ratifying his unauthorized act and adopting it as his own, after which action on the part of the principal the question as to whether the agent had authority in the first instance to do the act in question can no longer be raised.

In this case it must be conceded that, if, after the State Legislatures had adopted the Fifteenth Amendment, the people of the United States had adopted it as their own and ratified its adoption, no question as to whether it had been lawfully adopted could ever have been raised. Now, of course, the people have never done this in any formal manner—they have never ratified the Fifteenth Amendment acting through their representatives appointed for that purpose in convention assembled, as they did in the case of the original Constitution, but the Court might very well find that they have done what amounts substantially to the same thing.

Notwithstanding the fact that this Amendment in its ordinary operation affected in the most serious manner the most vital interests of every man and woman in the Union, and especially at every State, County and Municipal election, so that there was every possible opportunity and incentive to do so, no State and no individual citizen in the whole country for a period of nearly fifty years ever challenged the legality of its adoption. On the contrary, while the folly of it, as many have thought, and the cruel hardship of it were the theme of constant debate, all that long period—more than a generation—the

people of the whole country accepted and acted upon it and under it as though it had been of their own adoption and may thereby be deemed to have made it their own act.

Under such circumstances, the Court might well feel that it was no longer at liberty to consider or to pass upon the question whether the Fifteenth Amendment was at the sime of its original adoption without the scope of the amending power. And, so far as we may judge from its silence in regard to this point when, for the first and only time, it was presented to it in the case of Myers *v.* Anderson,[22] decided at the October Term 1914, that is the view which the Supreme Court has taken of the matter.

It goes without saying that, in case of any challenge of the Fourteenth Amendment at this time or at any time, the Court would be at liberty to dispose of it in the same way.

For these reasons (as well as others which might perhaps be advanced with reasonable prospect of acceptance, did time and space permit) it would seem that the question of the validity of the Nineteenth Amendment may be considered on its merits entirely without reference to either the Fourteenth or Fifteenth.

When this matter comes before the Supreme Court, as it soon will, that great tribunal will be faced with a question, which it is perhaps no exaggeration to say, will be the gravest with which it has ever had to deal in all its long history. Because, as already suggested, if this Suffrage Amendment is not beyond the limit of the amending power, it will be practically impossible to fix any limit on that power, and it will mean that the great American scheme of constitutional government is deemed to ultimate failure; that all that has heretofore been said by the Court in regard to the "indestructible union of indestructible States" has been mere talk, and that the idea that our forefathers succeeded in establishing "a government with limited powers" must be abandoned. Surely a most pitiful conclusion.

II

It remains to consider what bearing the recent decision of the Supreme Court in the cases arising under the Prohibition

[22] *Supra.*

Amendment, and especially the case of State of Rhode Island *v.* Palmer,[23] has upon this question. In the latter case the Court decides that this Amendment "is within the power to amend reserved by Article V of the Constitution". The Court does not state the grounds upon which this conclusion is based or the process of reasoning by which it was reached.

If the Court had said that it considered that Amendment to be within the amending power because the amending power, being conferred in general terms, is without limit, and therefore the constitutional agents upon whom it is conferred may adopt any Amendment they may see fit, the question which we are discussing would have been set at rest. But the Court did nothing of the kind, and the distinctly guarded language in which its findings on this point are stated would seem rather to warrant a contrary conclusion.

It is further to be noted that in rendering this decision the Court in effect asserted its right and power to determine the question of the validity of the Amendment to the Constitution, thereby holding that the question is a *justiciable,* and not a *political* one, as had been contended on behalf of the Government in those cases.

The question now to be considered, therefore, is: Could the decision in that case be cited as a precedent for a similar de cision in a case involving the validity of the Suffrage Amend ment? It would seem that it could not for reasons which are plain

While it may be true enough that the affirmance of the validity of the Prohibition Amendment as being within the power of amendment may furnish a precedent most dangerous for the future, yet the argument upon which the contention that the Suffrage Amendment is beyond the amending power is made in this paper could not be made against the validity of the Prohibition Amendment. For, while the Prohibition Amendment does undoubtedly have the effect of diminishing the reserved legislative powers of the State by transferring one of the subject of that power to the Central Government, *thereby establishing a precedent for the adoption of other Amendments*

[23] Sup. Ct. 486, decided June 7, 1920.

in the future by means of which all the legislative powers of the States may be taken away, yet it cannot be said to take away wholly or partially, or diminish from the State any power or *"function essential to the independent existence"* of a State.

A hundred years from now, in the event that "bone dry" prohibition should prove a failure, some of the States may find themselves greatly embarrassed and their best people greatly enraged because of having been deprived by this Amendment of the power to enact local laws better suited to promote the cause of temperance. Yet perhaps it could not be said that the right of a State to make laws for the regulation of use of intoxicating liquor, however convenient and important, is one of those rights or functions which are "essential to its independent existence" as a State, or a right, the destruction of which would destroy the State. That right might be taken away entirely, actually annihilated, and the State continue to function.

On the other hand, as we have already endeavored to show, the destruction of the right of the State to determine for itself, by the vote of its own people, who shall and who shall not vote at its own State elections, that is, who shall *govern* the State, is in effect the destruction of the State and its reduction to the status of a mere province or dependency.

III

But even though it be found that the Suffrage Amendment was within the power to amend conferred by Article V of the Constitution, the question remains whether that power has been exercised by each and all of the necessary thirty-six State Legislatures in the manner contemplated by that Article, that is, in a constitutional manner. However it may have been in other States (and as to them no opinion is expressed because the writer has not the data before him), it would seem sufficiently clear that such was not the case in the State of Tennessee and Missouri, not to speak of West Virginia.

The Constitution of the former State contains an express provision to the effect that no Legislature whose members were elected before Congress submitted an Amendment for ratification shall act upon such an Amendment: In effect that no ac-

tion shall be taken by the State Legislature until a Legislature shall have been elected after the proposed Amendment has been submitted.

Now, Article V confers upon the State Legislatures the *power* to ratify an Amendment, but it does not impose upon them any ***duty*** either to ratify or reject an Amendment at any particular time or place, or in any particular manner. The power of the people of each State in and by their several State Constitutions to regulate that matter is not taken away in terms and surely cannot be by inference. It merely provides that *"when* ratified by the Legislatures of three-fourths of the States" the proposed Amendment shall become to all intents a part of the Constitution of the United States, and that is all.

The States are given this *privilege.* They are not *obliged* to *exercise* it. Surely it was not intended to deprive the States, or the people of the several States of the power to determine *"when"* they should exercise that privilge *or whether they should exercise it at all.*

Article V expressly provides that *"when* ratified" by the requisite number of State Legislatures the Amendment shall become *ipso facto* a part of the Constitution, and therefore the Supreme Court felt constrained to hold in Hawke *v.* Smith [24] that "when" the Legislature of Ohio, *acting at the time and in the place and in the manner prescribed by the Constitution of that State,* did adopt a resolution ratifying the Amendment, this ratification was effective notwithstanding a provision in the Constitution of the State purporting to confer upon the people of the State the power to annul the ratification upon a referendum.

But surely this decision furnishes no warrant whatever for the conclusion that the Court would have held void a provision of the Constitution of the State of Tennessee, or of any other State requiring that the Legislature should not exercise on behalf of the State this great power without due deliberation, or until after a certain time after the submission of the Amendment, or except by a yea and nay record vote, or by a vote of two thirds of the members present, or the number of members which should be sufficient to constitute a quorum in acting upon

[24] 40 Sup. Ct. 495, decided June 1, 1920.

the Amendment at the place and the time at which the members of the Legislature should assemble for the purpose of acting upon the Amendment, or any other State constitutional provision designed to give assurance that when the Legislature acted upon an Amendment it would do so after having had ample opportunity to ascertain the wishes, the feelings and the needs of the people whom it represented and for whom it was acting in exercising the greatest and most dangerous power ever conferred upon a legislative body in all history—in effect the power to enact an irrepealable law—a law which neither the Legislature itself nor the people whom it represented, even by unanimous vote, could ever repeal.

To push the doctrine of Hawke *v.* Smith to such an extreme as that would not be in accord with the habit of the Supreme Court. Rather might we expect it to say in the language of Chief Justice Fuller in Pollock *v.* Farmers' Loan & Trust Co.: [25]

> "Manifestly, as this Court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

It would seem that to hold that the people of a State had been deprived (by implication) by Article V of the Constitution of the United States of the power to provide in their own State Constitution that their representatives in their State Legislature should not exercise the power to ratify Amendments to the Federal Constitution which in effect radically amended their State Constitution until after they had had an opportunity themselves to exercise in an intelligent manner, after study of the meaning and probable effect of the proposed measure, the right of petition to their Legislature, would be to fall into an "error in principle" indeed.

The persons elected by the people to be members of a State Legislature do not become a Legislature merely by such election. If the persons thus elected were to meet at some remote place, say in the mountains of East Tennessee, or at some other than

[25] 157 U. S. 429, 576.

the time designated by the Constitution of Tennessee, no action which they might take could possibly have any legality. And even though they assembled at the time and in the place designated in the said Constitution, they could not act legally without having a quorum as fixed by the State Constitution present.

Certainly Article V would confer no such power as that upon them any more than it confers such a power upon Congress. This article confers upon the State Legislatures the power to ratify in the same sentence in which it confers upon Congress the power to propose Amendments, and in the Rhode Island case,[26] the Supreme Court says:

> "The two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the members present, *assuming the presence of a quorum.*"

And that, of course, means the number prescribed by the Constitution of the United States, the instrument to which Congress owes its existence, Congress being created by that Constitution.

The Constitution makes a majority of the members of Congress sufficient to constitute a quorum, but there is no settled rule in legislative bodies, and was not at the time of the adoption of the Federal Constitution. The British House of Lords the oldest legislative body in the world, with a membership of more than five hundred, requires only four members for a quorum Obviously the same rule must apply to the Legislature of a State. It can only act with the number prescribed for a quorum by the State Constitution.

Neither can it act except at the time prescribed by that Constitution, and in the case of Tennessee that time is declared to be not until after the persons constituting the Legislature have been elected subsequent to the proposing of the Amendment.

In other words, as already observed, the Constitution of the United States in Article V confers upon each State, or three fourths of them, the *privilege* of ratifying these Amendments through their Legislatures. It does not take away from the States the privilege of determining the time *"when"* those Legislatures shall do so. This view would seem to be fully con-

[26] *Supra.*

firmed by the decisions rendered by the Supreme Court in other recent cases. For instance, in the case of Haire *v.* Rice,[27] in which the Supreme Court, speaking through Mr. Justice Moody says:

> "In support of it the plaintiff in error argues that the grant of all the land by the Enabling Act (an Act of Congress) was by an ordinance accepted by the State 'upon the terms and conditions therein provided'; that the Legislature of the State was by the last clause of Section 17 appointed as agent of the United States, with full power to dispose of the lands in any manner which it deemed fitting, provided only that the lands or their proceeds should be devoted to normal school purposes; and that, therefore, in the execution of this agency the Legislature was not and could not be restrained by the provisions of the State Constitution." (Just as it is argued now that the State Legislature being appointed as agents of the people of the United States for the purpose of adopting the Amendments to the Constitution, deriving their authority not from the States but from the Constitution itself, cannot be restrained by the provisions of the State Constitution in any way.) [Parentheses ours.]

Mr. Justice Moody then goes on to say:

> "It is vitally necessary to the conclusion reached by these arguments *that the Enabling Act should be interpreted as constituting the legislature, as a body of individuals and not as a parliamentary body, the agent of the United States.* But it is not susceptible of such an interpretation. * * * It is not to be supposed that Congress intended that the authority conferred by Section 17 of the Enabling Act upon the Legislature should be exercised by the mere ascertainment of its will, perhaps when not in stated session, or by a majority of the votes of the two houses, sitting together, or without the assent of the executive, or independently of the methods and limitations upon its powers prescribed by its creator. On the contrary, the natural inference is that Congress, in designating the Legislature as the agency to deal with the lands, intended such a Legislature as would be established by the constitution of the State. It was to a *Legislature whose powers were certain to be limited by the*

[27] 204 U. S. 291, 299.

organic law, to a Legislature as a parliamentary body, acting within its lawful powers, and by parliamentary methods, and not to the collection of individuals, who for the time being might happen to be members of that body that the authority over these lands was given by the Enabling Act. It follows, therefore, that in executing the authority entrusted to it by Congress the Legislature must *act in subordination to the State Constitution,* and we think that in so holding the Supreme Court of the State committed no errors." (Italics ours.)

But aside from the provisions in question of the Constitution of Tennessee, it would seem to be reasonably clear from what actually took place when the resolution to ratify the Nineteenth Amendment was pending in the Legislature of that State, that according to the principles laid down by the Supreme Court in Hair *v.* Rice [28] that resolution was never legally adopted. The resolution appears to have been a joint resolution of the House and Senate. It was passed by the Senate and then sent to the House of Representatives, being at first adopted by a majority of two in that House.

According to the rules of parliamentary procedure governing the Legislature of Tennessee, however, the vote by which the resolution was adopted in the House could not be a *finality* until the expiration of a certain time which was allowed for the offering of a motion to reconsider. Until the expiration of that time, or in the event of the making of a motion to reconsider within the time, the effect of the vote adopting the resolution was like that of a judgment *nisi upon a verdict.*

As a matter of fact, the motion to reconsider was made within the prescribed time, at a session of the House at which *no quorum* was present, that is to say, no such quorum as is prescribed by the Constitution of the State of Tennessee, and this motion to reconsider was voted down. This action, of course, upon the part of the members present was an absolute nullity. Shortly afterwards, the motion to reconsider not having legally been disposed of, and therefore being still pending, at a session at which a quorum *was* present the motion to reconsider

[28] *Supra.*

was carried by an overwhelming majority, and a further motion adopted rejecting the Amendment. It would seem, therefore, manifest that the Legislature of Tennessee had not ratified the Amendment.

It has been suggested that the Courts will nevertheless be bound by the certificate furnished by the Governor of Tennessee to the effect that the Legislature has ratified the Amendment, notwithstanding the fact that that certificate is not a true statement of what occurred.

It would be interesting to see upon what real authority that startling proposition can be based. In any event, it cannot be discussed within the limits of this paper. It may be observed, however, that if such a contention could be sustained, it would confer a power upon a Governor of a State over the affairs of these great people such as never could have entered into the calculations of the framers of the American Constitution.

The Constitution of the State of Missouri contains the following:

> "Article II, Section 3. That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their Governments are necessary to an indestructible Union and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any Amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State."

Of course, if this provision of the Constitution of Missouri is binding upon the members of its Legislature, their action in ratifying the Amendment was void. Whether or not the Supreme Court will hold it was void will depend on whether that Court takes the view already presented in this paper as to the effect of Article V of the Constitution, that view being that by this Article there is conferred upon each State acting through its Legislature the power—the *privilege* of voting for the ratification of any Amendment to the Constitution properly proposed by Congress. But no obligation is imposed upon the

State or its Legislature—no *duty* to act upon the proposed Amendment at any particular time, or *to act upon it at all*—and that Article V cannot by implication be so extended as to deprive the people of the State of Missouri of the right to determine whether their Legislature should ever ratify an Amendment of this kind. Those who have the power to say "when" have the power to say "never".

In conclusion, it may not be amiss to say that it is manifest that the future course of American history may be profoundly affected by the decision which may be rendered by the Supreme Court of the United States upon these questions, and it may be safely assumed that this decision will not be a hasty one—that it will not be rendered by that great tribunal until after it has *made sure* that it has heard all that can be fairly said in regard to them.

For it may be that the fate of constitutional government in America waits upon its judgment.

Wm. L. Marbury.

BALTIMORE, MD.